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In the Supreme Court of the United States

OCTOBER TERM, 1988

LAST CHANCE MINING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in dismissing their just compensation claim, arising from the government's purported loss of records filed by petitioners with the Bureau of Land Management pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*

1. The Federal Land Policy and Management Act of 1976 (the Act) "creates a federal recording system designed to clear up uncertainty surrounding many mining claims" (Pet. App. A4). Under Section 314 of the Act, 43 U.S.C. 1744, an owner of an unpatented lode or placer mining claim located prior to October 21, 1976, must file a notice or certificate of location of the claim. That filing must be made with the Bureau of Land Management (BLM), and must also be recorded by BLM, on or before October 22, 1979. In addition, in the year of the initial recording, and prior to December 31 of every year thereafter, each claimant "must file with state officials and with BLM either a

notice of intention to hold the claim, an affidavit of assessment of work performed on the claim, or a detailed reporting form" (Pet. App. A4). Finally, Section 314(c) of the Act, 43 U.S.C. 1744(c), provides that "[t]he failure to file such instruments * * * shall be deemed conclusively to constitute an abandonment of the mining claim * * *." In *United States v. Locke*, 471 U.S. 84 (1985), this Court upheld the constitutionality of Section 314(c).

2. Petitioners were owners of unpatented mining claims that had been located prior to October 21, 1976. They alleged that, in compliance with the Act, they submitted all the requisite documents to BLM prior to October 22, 1979, but that BLM personnel had negligently failed to record the filing. As a result, petitioners asserted, a different mining company ousted petitioners' claim and extracted large amounts of ore from the property. Petitioners accordingly commenced a damages action in the United States Claims Court, alleging three causes of action: (1) breach of a fiduciary duty owed to petitioners by the Secretary of the Interior; (2) breach of an implied-in-fact contract arising from the Act and its implementing regulations; and (3) a taking in violation of the Fifth Amendment, giving rise to a claim for just compensation. Pet. App. A10-A11.

Without resolving the factual dispute over whether petitioners had actually filed the required documents with BLM (see Pet. App. A6-A12), the Claims Court dismissed petitioners' complaint for failure to state a claim (*id.* at A1-A34). It first found (*id.* at A12-A17) that petitioners' action based on a breach of fiduciary duty was outside the jurisdiction of the Claims Court and that, in any event, petitioners had been "unable to point to any act or regulation which can be construed as creating a trust relationship between [them] and the United States, much less one which is justiciable in this court" (*id.* at A14-A15). Next,

the court rejected (*id.* at A17-A21) petitioners' contract claim, finding that the " 'plethora of rules, regulations and statutes' " on which petitioners relied "do not purport, even by implication, to constitute an offer" to contract (*id.* at A17, A20). The court also dismissed petitioners' claim for just compensation under the Fifth Amendment (*id.* at A21-A28). It could find "no precedent * * * for the proposition that the inaction of a regulatory body in carrying out its statutory duty under circumstances similar to those alleged here has ever been held to be a taking" (*id.* at A22-A23). Finally, having rejected petitioners' three claims on the merits, the court observed that had petitioners been seeking review of a final administrative decision rejecting their mineral rights claims, the Claims Court would lack jurisdiction, since only a federal district court may entertain such a challenge, pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* And even then, the court added, petitioners' position would have been further "[c]ompl[ic]at[ed]" by their failure to exhaust administrative remedies. Pet. App. A29-A34. In an unpublished order (*id.* at B1-B2), the court of appeals affirmed "[f]or the reasons stated by the Claims Court * * *."

3. The courts below correctly rejected petitioners' just compensation claim. As the Claims Court observed (Pet. App. A22), petitioners have "cite[d] no precedent * * * for the proposition that the inaction of a regulatory body in carrying out its statutory duty under circumstances similar to those alleged here has ever been held to be a taking." Indeed, this Court's decision in the *Locke* case is persuasive authority to the contrary. There, as here, the plaintiffs contended that government negligence—in that case, the provision of misleading information about a filing deadline—had prevented the plaintiffs from complying with the terms of the Act in a timely fashion. This Court, noting that the Act imposed only "the most minimal of

burdens on claimants" (471 U.S. at 106), rejected plaintiff's demand for just compensation. The Court explained that, notwithstanding the alleged misinformation, the plaintiffs could easily have taken steps to learn the correct filing date, but they failed to do so. The Court held (*id.* at 107 (citation omitted)) that it had " 'never required [Congress] to compensate the owner for the consequences of his own neglect.' "

Here, as well, petitioners had ample opportunities to comply with the Act, but failed to do so. Even were they correct in alleging negligence by BLM — a question that the courts below did not resolve — petitioners could easily have taken steps to ensure that their papers were timely filed and recorded by the agency. Their neglect to do so is entirely their own and warrants no compensation from the government under the Fifth Amendment.¹

4. Petitioners also challenge (Pet. 13-18) the court of appeals' suggestion that petitioners failed to exhaust administrative remedies. In fact, however, the courts below referred to exhaustion only in passing, and even then only as an "observation" (Pet. App. A29) that had no apparent effect on the outcome of the case. Whatever the merit of petitioners' claim that exhaustion would have proved futile,² there is no reason to review that claim in the present case.

¹ Petitioners err in relying (Pet. 11-12) on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In that case, the Court held that appellant's due process rights had been violated when the Illinois Fair Employment Practices Commission failed to process his discrimination charge in a timely fashion. There is no suggestion in the case, however, that the appellant had a cognizable claim for just compensation.

² It is manifest that an administrative claim by petitioners that BLM had improperly failed to record their filings would have served "[t]he basic purpose of the exhaustion doctrine * * * to allow an adminis-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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trative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors * * *." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). Petitioners elected instead to sue for a monetary award.